Docket No.

Supreme Court, U.S.

In The

09-589 NOV 18 2009

Supreme Court of The United States

OFFICE OF THE CLERK

HOA T. NGHIEM,

Petitioner,

v.

UNITED STATES DEPARTMENT
OF VETERANS AFFAIRS, et. al.,

Respondents.

Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

PETITION and APPENDIX

MITCHELL L. PERRY
Attorney for Petitioner
2566 Wilson Avenue
Bronx, New York 10469
(718) 881-9008

Appeal Press · (914) 761-3600 (212) 267-6602 (516) 872-1110 (14317)

QUESTION PRESENTED

The Second Circuit Court of Appeals denied rehearing of their affirmance of the United States District Court for the Southern District of New York's grant of dismissal pursuant to Federal Rule of Civil Procedure number 12 (b) (6).

The question presented is as follows :

Did the Second Circuit Court of Appeals err in failing to exercise its inherent power to reverse the Memorandum Decision and Order of the United States District Court for the Southern District which granted Defendants' motion to dismiss Petitioner's complaint based on Federal Rule of Civil Procedure number 12 (b) (6) ?

It is respectfully submitted the answer to the question presented is yes and this Court should grant review.

LIST OF PARTIES

The caption of the case lists all parties to the proceeding in the Court whose judgment is sought to be reviewed.

CORPORATE DISCLOSURE STATEMENT

Not applicable.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

LIST OF PARTIES..... ii

CORPORATE DISCLOSURE STATEMENT..... ii

TABLE OF CONTENTS..... iii

TABLE OF CITED AUTHORITIES..... v

TABLE OF APPENDICES viii

OPINION BELOW..... ix

STATEMENT OF JURISDICTION..... ix

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... x

STATEMENT OF THE CASE..... 1

REASONS FOR ALLOWANCE OF THE WRIT..... 23

IT IS RESPECTFULLY SUBMITTED THAT THIS HONORABLE COURT REVIEW THE SECOND CIRCUIT COURT OF APPEALS AFFIRMANCE OF THE MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DISMISSING PETITIONER'S COMPLAINT BECAUSE THERE ARE ISSUES OF FACT INAPPROPRIATE FOR DISMISSAL..... 23

CONCLUSION..... 34

TABLE OF CITED AUTHORITIES

Page

Archer v. Globe Motorists,
833 F.Supp 211 (SDNY 1993).....32

Baldwin County Welcome Center v. Brown,
466 US 147, 80 L.Ed. 2d 196, 104 S.Ct. 1723 (1984).....32

Board of Regents v. Roth, 408 U.S.564,
92 S.Ct 2701, 33 L.Ed 2d 548 (1971).....28

Cerbone v. International Ladies' Garment Workers,
768 F.2d 45 (2d Cir. 1985).....27

Chance v. Armstrong,
143 F.3d 698 (2d Cir. 1998).....24

Conley v. Gibson, 355 U.S.41, 78 S.Ct. 99,
2 L.Ed. 80 (1957).....23, 24

Delaware State College v. Ricks, 449 U.S. 250,
66 L.Ed. 431, 101 S.Ct. 498 (1980).....31

Forrest v. Jewish Guild, 309 A.D.2d 546,
765 N.Y.S.2d 326 (1st Dept 2003).....25

Hoffkins v. Monroe, 2007 U.S. Dist
LEXIS 32313 (W.D.N.Y 2007).....29, 33

Kaluczky v. City of White Plains,
57 F.3d 202 (2d Cir. 1995).....32

Page

Kronisch v. United States,
150 F.3d 112 (2d Cir. 1998).....29

Lightfoot v. Union Carbide,
110 F.3d 898 (2d Cir. 1997).....25

Lipsky v. Commonwealth United,
551 F.2d 887 (2d Cir. 1984).....23

McClary v. O'Hare, 786 F.2d 83 (2d Cir. 1986).....33

Miller v. I T & T, 755 F.2d 20 (2d Cir 1985).....29

Olson v. Rembrandt Painting,
511 F.2d 1228 (8th Cir. 1975).....30, 31

Paese v. Hartford Life Accident Insurance,
449 F.3d 435 (2d Cir. 2006).....24

Ryder Energy v. Merrill Lynch,
748 F.2d 774 (2d Cir. 1984).....23

Singleton v. City of New York, 450 U.S. 920,
67 L.Ed. 347, 101 S.Ct. 1368 (1981).....18, 28

Thompson v. Carter, 284 F.3d 411 (2d Cir 2002).....24

Zerilli-Edelglass v. New York,
333 F.3d 74 (2d Cir. 2003).....24

Zinermon v. Burch, 494 U.S. 113,
110 S.Ct 975, 108 L.Ed 100 (1990).....28

STATUTES

Federal Rule of Civil Procedure 8.....23

Federal Rule of Civil Procedure 12.....24, 25, 29, 33

TABLE OF APPENDICES

Page

Appendix A — Order of the United States Court of Appeals for the Second Circuit denying Petition For Rehearing dated August 14, 2009.....1a

Appendix B — Order of the United States Court of Appeals for the Second Circuit affirming dismissal dated March 31, 2009..... 3a

Appendix C — Memorandum Opinion and Order of the United States District Court for the Southern District of New York granting Motion to Dismiss dated September 5, 2006 .....7a

OPINION BELOW

The initial opinion of the United States Court of Appeals for the Second Circuit is reported at Nghiem v. United States Department of Veteran Affairs, 323 Fed. Appx. 16 (2d Cir 2009) dated March 31, 2009. The Second Circuit affirmed the grant of dismissal by the United States District Court for the Southern District of New York dated September 5, 2006, reported at 451 F.Supp 2d 599. *See* Appendices A-C

STATEMENT OF JURISDICTION

The Second Circuit's Order denying Petitioner's Petition for Rehearing was rendered on August 14, 2009 *See* Appendix A.

The within Petition for Certiorari has been submitted within the 90-day time deadline for United States Supreme Court review of a Federal Court of Appeals Decision not to exercise its inherent power to reverse a District Court's dismissal of the initial action based upon Statute of Limitations defense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code § 1981

Equal rights under the law.

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

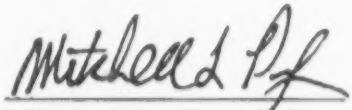
Title 42 United States Code § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF COMPLIANCE

Mitchell L. Perry, Esq., an attorney duly licensed to practice law in the Courts of the State of New York and the United States Supreme Court, and attorney of record for Petitioner in this application, does hereby certify pursuant to the rules of the United States Supreme Court, that the within brief has a word count of 8187, within the limit set by the Court Rules.



Mitchell L. Perry, Esq.
2566 Wilson Avenue, #1
Bronx, New York 10469
(718) 881-9008

Attorney for Petitioner

STATEMENT OF THE CASE

This affected dentist Hoa Thi Nghiem (hereinafter "Petitioner"), is a female Asian dentist, at all times herein mentioned over the age of 40. Petitioner was selected to work as a geriatric dentist at the Veterans Administration ("VA") Medical Center of Bronx, New York ("VA Bronx") on a two-year probationary period from September 20, 1991 to September 20, 1993 thanks to her "very impressive educational and experience background" according to the statements made by VA Bronx Dental Chief Dr. Gerald F. Sabol ("Dr. Sabol") to the Veterans Administration Professional Standards Board and the statements made by Dr. Sabol and Dr. Vincent Petrazzuolo ("Dr. Petrazzuolo"), the VA Bronx Assistant Chief in their reports to the Equal Employment Opportunities Commission ("EEOC").

Petitioner, then a probationary dentist, was granted by the VA Professional Standards Board, the rank of Chief and the level 9 out of 10. Similar to the rank of Dr. Sabol, the VA Bronx Dental Chief, Petitioner was granted by the Columbia University Dental School, the senior academic rank of Associate Professor, while her direct supervisor, Assistant Dental Chief Dr. Petrazzuolo, only held the junior academic rank of Associate Professor, a situation that greatly disturbed him.

With regard to work assignment, as a geriatric dentist, Petitioner was first assigned only to provide oral healthcare to VA in-patients and to VA nursing home residents, and specifically to treat patients in the Geriatric and Extended Care Unit.

Later, besides Petitioner's regular duties, she was assigned a weekly morning session to do oral screening examination or emergency treatment to VA outpatients, due to the overload of patients and the shortage of treating dentists. In fact, VA Bronx Dental Chief Dr. Sabol was already retired from clinical practice when Petitioner came to work at VA Bronx. Meanwhile, the Assistant Chief Dr. Petrazzuolo was enrolled as a postdoctoral resident in the prosthodontic program at the Columbia University Dental School.

Concerning the matter of interpersonal relationship, according to witnesses' testimonies recorded in the VA Bronx Equal Employment Opportunity Counselor's Report, which copies had been sent to VA Bronx Dental Chiefs, along with VA dentist members of the local Professional Standards Board and, according to witnesses' testimonies submitted to the VA Agency Investigator, Dr. Sabol, VA Bronx Dental Chief, initially treated Petitioner very well, considering her a valued staff member, spoke highly of her, and often related how she could be beneficial for the dental clinic. Then, according to those witnesses, this soon changed, Petitioner was soon made an outcast of the dental service, with other dentists not speaking to her. A witness told the VA Bronx Equal Employment Opportunity Counselor, that she could not understand how a doctor with so many degrees and teaching qualities could be put down so low and how could the VA Bronx Dental Chief speak of Petitioner as a highly recommended doctor and now treat her in such an unprofessional manner.

Another witness stated in the VA Bronx EEO Counselor Report that "the Dental Chief appeared close to

[Petitioner] until she apparently went outside the dental service with concerns". Here, Dr. Stephen F. Bergen, VA Manhattan Dental Chief ("Dr. Bergen"), then Chairman of the local Professional Standards Board was more explicit. Dr. Bergen stated more clearly on this matter in his Board Action to recommend termination of Petitioner a few days before the termination of Petitioner's two-year probationary period, because "she questioned the dental service's administrative policies including issues which do not concern her position". So, "her inability to work under the layered VA authority structure" was among the causes of Petitioner's termination. Dr. Bergen did not elaborate his statements beyond the retaliatory basis he asserted as reasons for Petitioner's firing.

In actuality, the truth was that Dr. Sabol, VA Bronx Dental Chief who was retired from clinical practice, delegated his Dental Chief's duties to Dr. Petrazzuolo, the Assistant Chief. The latter delegated his duties, in turn, to a dental assistant/administrative officer so Dr. Petrazzuolo could attend his post graduate didactic or clinical training at Columbia University Dental School. As a result, said assistant/administrative officer became very arrogant to staff dentists, specifically Petitioner. According to her own statement made to VA Bronx EEO counselor, "Dr. Nghiem did not view her as a dentist making any communication difficult".

Petitioner then raised with VA Bronx Dental Chief Sabol and Assistant Chief Petrazzuolo, the ethical issue related to the above facts and petitioned that they would delegate, during their absence, their Dental Chief's duties to another staff dentist instead of to a dental assistant/administrative officer.

For undisclosed reasons, the VA Bronx Dental Chiefs refused to resolve the matter, said failure causing the dental assistant/administrative officer to be even more aggressive to dental residents including Petitioner. So, Petitioner brought up the matter to the Dental Dean, who was also chairman of the Dean's Committee for the Dean to discuss the matter with the VA Dental Chief, a member of the consortium. As a result, the latter indicated to the Dental Dean that he believes he has a satisfactory solution to the problem which he will be discussing with the Petitioner. The Dean believed it a good solution.

However, according to witnesses' testimonies made to VA Bronx EEO counselor "Dr. Sabol, the VA Bronx Dental Chief, and Mrs. Brock, the dental assistant/administrative officer, acted in concert to Petitioner's demise. The other dentists would not speak to Petitioner, essentially making her an outcast. Dr. Sabol rallied doctors against Petitioner. Dr. Sabol's actions were designed to put Petitioner on the street.

Mrs. Brock, the dental assistant/administrative officer, who worked closely with the VA Bronx Dental Chief and Assistant Chief, affirmed to VA Bronx EEO counselor that from everything she knew, it was performance that led to Petitioner's removal. She clearly implied that the VA Bronx Dental Chiefs and administrative officer fabricated lies against Petitioner in their reports of unsatisfactory performance in order to terminate her.

VA Bronx By Laws and Regulations state that : "during the probationary period, professional competence, performance and conduct will be closely evaluated under applicable VA Policies and Procedures. If, during this period, the employee demonstrates an acceptable level of

performance and conduct, the employee will successfully complete the probationary period".

Like most policy on probationary and trial periods in other institutions or organizations, VA Policy on Probationary and Trial Periods advises VA supervisors to demonstrate that every effort was made to provide a probationary employee with guidance to help him or her succeed in the position. VA supervisors in counseling sessions should provide a probationary employee with sufficient information on conduct and performance standards and on how to meet those standards. VA supervisors should prepare written summaries of counseling sessions in which the specific deficiencies are identified with the reasons why those deficiencies were occurring, along with a plan of training or of suggested behavior changes on the part of the employee should be formulated as corrective actions by VA supervisors. A report of such summaries of counseling sessions should then be provided to the probationary employee and a copy retained for the supervisors' records.

VA Bronx Dental Chiefs, Dr. Sabol and Dr. Petrazzuolo wrote their Reports of Proficiency as negative appraisals regarding Petitioner's performance, conduct and competence and then put their reports in Petitioner's personal files without informing her in direct, intentional contravention of the aforesaid stated policies and practices. The doctors call their reports, their Reports of Contact to affirm that there was as they put it "informal counseling". However, at that point the doctors refused to reveal any corrective actions taken regarding identified deficiencies of Petitioner such as how Petitioner had deviated from the standard of care given under similar

conditions. It should be quite clear that the aforesaid doctors were following their own private agenda, willfully violating VA standard practices and policies.

Dr. Sabol and Dr. Petrazzuolo's negative Reports of Proficiency regarding Petitioner's deficiencies in the areas of clinical competence, administrative competence and personal qualities were referred to a local Professional Standards Reviewing Board, chaired by Dr. Stephen F. Bergen ("Dr. Bergen"), VA Manhattan's Dental Chief for review.

Chairman Bergen, in his Notice of Hearing, stated that he would discuss the Proficiency Report dated May 28, 1993. Prior to the hearing scheduled for August 19, 1993 Petitioner, by hand delivery, submitted to the reviewing board her Memorandum which had been previously submitted to the VA Bronx Dental Chiefs and to Chairman Bergen refuting each and every charge mentioned in the above report on the matter of her interpersonal relationship, alleged inability to comply with patient eligibility regulations and deviation from standards for skills and care related to the cases as reported therein.

Dr. Bergen, the Chairman of the Reviewing Board in his Board Action, acknowledged that Petitioner stated that all allegations were untrue and that she was never told what was expected of her in her capacity as a geriatric dentist nor otherwise address the alleged deficiencies Dr. Bergen had reported he perceived.

As a dentist himself, Chairman Bergen deliberately ignored the basic rules in dental malpractice law that dentists are supposed to know, to wit, in malpractice

litigation, the proper skills and care of a defendant dentist will be presumed in the absence of evidence to the contrary. A defendant dentist need not introduce any evidence as defense. Negligence or incompetence on his/her part must be affirmatively proved. Furthermore, the American Dental Association ("ADA") acknowledged that dentists may vary in their approaches to treatment because they are trained differently and have different treatment philosophy. The ADA , in its Principles of Ethics and Code of Professional Conduct under section "Justifiable Criticism" states that : "A difference of opinion as to preferred treatment should not be communicated in a manner which would imply mistreatment" and further advises against disparaging statements against dentists saying that "where comments are made which are obviously not supportable, and therefore unjustified, such comments can be the basis for the institution of disciplinary proceedings against the dentists making such statements".

In the instant case, Dr. Bergen, then Chairman of the local Professional Standards Board, took advantage of the Regulations on Professional Review to take sides with his colleagues at VA Bronx without any effort being made to ascertain the facts. Dr. Bergen shielded himself behind the regulations saying that "a Professional Review is not an adversary procedure. In conducting the review, the Board will be reviewing the employee's entire employment record, employee's proficiency ratings, counseling reports and evaluation by supervisors. The Board's recommendation will be based solely upon a careful review and analysis of the record, the facts of the case, and also the information furnished by the affected employee and others who may be called upon by the Board. All review

will be held in private and the affected employee will not be allowed to be present while others are being questioned. Neither the affected employee nor any other person who will be questioned will be subject to cross-examination procedures. All tests and affirmations will not be required or administrated in connection with the Board review."

In his application of the Professional Review Regulations, Chairman Bergen, only interviewed the VA Bronx Dental Chiefs, Dr. Sabol and Dr. Petrazzuolo and Petitioner then examined with VA supervisors their Reports of Proficiency and the patient's cases as presented by them, making findings and determination regarding Petitioner's deficiencies in the area of clinical competence, administrative competence and personal qualities.

Upon interview, Chairman Bergen did not ask Petitioner any questions in the area of administrative competence or interpersonal relationship. He asked only few questions related to clinical competence, specifically regarding the two cases of infective endocarditis where Petitioner was charged by her supervisors with having endangered the lives of VA patients. Those questions were orally answered. Petitioner told the Board that a patient at risk for infective endocarditis was not given antibiotic coverage because it was a reparation of a broken wire above the gum line and it was not a bleeding procedure, and that, according to the American Heart Association, antibiotic coverage is not recommended. In the second case, Petitioner, as treating dentist and treating periodontist of the patient at risk for infective endocarditis, had recommended extraction of the tooth with severe periodontal disease, because medical and

dental experts in infective endocarditis prevention and treatment said that endocarditis is always fatal unless dental focus of infection be eradicated.

As Petitioner had mentioned are in her numerous complaints submitted to VA reviewing authorities and also to the EEOC, with copy sent to Chairman Bergen for his awareness and rebuttal, in that meeting with the Professional Standards Board Review lasting a mere 15 minutes, Chairman Bergen told Petitioner that supervisors have the right to write whatever they wanted in their appraisal of probationary employees, and the right to write as many appraisals as they wanted with probationary employees having no right to appeal same. Chairman Bergen additionally told Petitioner that she was "too qualified to be in the VA and needed not to be in the VA" informing Petitioner that he "would clear her record if she accepted to be out of the VA and that his decision would be the final decision", a blatantly inappropriate *quid pro quo*. Petitioner then asked Chairman Bergen to give her justice and authorization to submit to the Board, her new memorandum of defense as written answers to the Board's questions which Chairman Bergen agreed to.

In her Memorandum with 16 exhibits attached, Petitioner answered in writing what she had already answered orally during the meeting with the Review Board. Petitioner also petitioned in said Memorandum, that Chairman Bergen give her an opportunity to be heard and that she be notified of any other questions that the Board required. Petitioner also petitioned that the Board apply the basic rules of evidence in dental malpractice law with regard to the accusations of professional incompetence made by VA Bronx dental supervisors

against her. A copy of said memorandum was sent to the VA Bronx Chief of Staff, the Columbia University Dental Dean, and the chairman of the VA Bronx Dental Dean's Committee along with Dr. Sabol.

Later, when Petitioner learned that Chairman Bergen improperly concealed from Board members and VA reviewing authorities her Memorandum of Defense with the 16 exhibits attached, Petitioner asked her lawyer to request Chairman Bergen to send the concealed documents to VA agency. Such request was intentionally ignored and never honored by Chairman Bergen, upon advice of the VA Regional Counsel.

As a result, VA Regional Legal Counsel joined in the violation by Dr. Bergen, a VA Dental Chief, of VA Employees Standards of Ethical Conduct and Related Responsibilities requiring on the part of VA employees "honesty, integrity, impartiality and ethical conduct". It should be quite clear that VA Regional Legal Counsel has also authorized Dr. Bergen as Chairman of the Reviewing Board, to make deliberately false allegations against Petitioner in his Board Action to destroy her professional career and personal life by misleading VAMC Bronx authorities, VA Central Agency and the EEOC into believing in his deliberately false allegations to issue their intentionally baseless and erroneous decision against Petitioner.

Thus, in his Board Action, Chairman Bergen stated that:" the incidents of treatment problems with Dr. Nghiem is greater than with any other staff dentist" even though Chairman Bergen is unable to show any case in support of such an allegation. Chairman Bergen also

stated as his findings that "there are treatment planning diagnosis and patient management issues" which said allegations have been later unanimously dismissed as unjustified by a hearing panel of the New York State Office of Professional Discipline.

Chairman Bergen, by his concealment of Petitioner's Memorandum of Defense with the 16 exhibits he received from her along with his concealment of material facts in connection with his investigation, has successfully misled the VA Central Agency into believing that Petitioner, in his words "offers no rebuttal" for the agency to repeat verbatim all false charges made by the VA Bronx Dental Chiefs Dr. Sabol and Dr. Petrazzuolo and by Dr. Bergen himself against Petitioner. Clearly, Petitioner offered extensive and thorough rebuttal evidence, and Dr. Bergen blatantly lied.

Consequently, Chairman Bergen also successfully misled the EEOC into believing in all those false allegations to make erroneous findings of fact upon which the agency issued its decision against Petitioner. In point of fact, to find against Petitioner, the EEOC cited as example of Petitioner's deficiencies "an incident where in the dentist ordered a dental resident to extract a tooth from a patient who should not have a tooth extraction under any circumstances, the patient was being worked up for endocarditis and should not have had a tooth extraction. VA supervisors maintained that "the dentist's order would have been potentially dangerous, even life-threatening". Ironically, there is no US/international medical/dental literature stating that a patient being worked up for endocarditis, should not have had tooth extraction under any circumstances because it could be life

threatening.

The EEOC decision also repeated VA Bronx supervisor's false assertion that "probationary dentist received as much assistance as could be provided considering the shortage of dental assistants in the service" when dental residents and Dental Chief's office secretary and dental assistants and hygienist all said to the EEO Bronx Counselor that contrary to the assertion of the supervisor, Petitioner "was provided with no assistant and working mostly alone".

The EEOC decision also indicated that "supervisor mentioned complaints from residents that Petitioner would not share her experience and knowledge with them" when residents stated with VA Bronx EEO Counselor that "residents were advised that Dr. Nghiem was not up to par in her practice and not to waste time seeking her out as a resource and that anyone who befriended Dr. Nghiem had a hard time.

In any event, by his deliberately false statements in his Board Action, Chairman Bergen has induced the VA Bronx Chief of Staff to concur with his statements and his recommendation to terminate Petitioner. Consequently, Chairman Bergen introduced the VA Bronx Director to make out his list of 14 charges indicating that Petitioner's "practice patterns jeopardized and compromised the quality of VA patient care" for the Director to report those charges to the New York Licensing Authority for further disciplinary action against Petitioner.

VA Bronx Director, according to his statements made to the VA Agency Dental Professional Board, also

based his action to terminate Petitioner, during her probationary period, on the recommendation proffered by the Chief of Staff and Board Action. In his report to VA General Counsel, he also informed that he would disclose to the New York State Licensing Authority that "Dr. Nghiem significantly failed to meet generally accepted standards of clinical practice as to raise reasonable concerns for the safety of patients when during her clinical performance as a dentist she jeopardized and compromised the quality of patient care".

The Director asserted in this Report in fact the specific incidents which were discussed in the Board meeting led management to initiate action to terminate the probationary dentist. However he mentioned that the following statements were made by her attorney on her behalf : "She felt that the charges against her were unwarranted, that she was not afforded an opportunity to defend herself appropriately, that she was not provided with the evidence on which the decision to terminate her was based, and that she was not afforded the opportunity to present evidence, that the alleged factual statements made against her were based on fiction and made with malice and that the Local Professional Standards Board that reviewed her case was biased". She also requested that she be afforded the due process of the legal system.

In addition to Chairman Bergen's misuse of the non-adversarial procedure related to Professional Review in the instant case, he participated with VA Bronx Dental Chief Dr. Sabol in the latter's decision to suspend Petitioner's hospital privileges, without any reasonable cause except with the vague, unspecified pretext of "past practice patterns" and without any legal authority, and

without any safeguard measures nor due process hearing which would have accorded Petitioner a full hearing, cross-examination, administration of oath, and right to appeal as prescribed by the VA Bronx By Laws and Regulations regarding the manner of suspension of VA physicians and dentists' hospital privileges.

As a response, Petitioner immediately appealed that suspension of her hospital privileges to the VA Bronx Director. Petitioner petitioned that she be given an opportunity to be heard in order to discuss the alleged charges made by VA Bronx Dental Supervisors against her but Petitioner received no answer from the Director.

Clearly. the three VA Dental Chiefs involved in the matter, to wit, Doctors Sabol, Bergen and Petrazzuolo acted in concert to successfully blacken Petitioner's professional reputation by imposing on her the stigma of gross incompetence for, in their own words, having incidents of treatment problems greater than with any other dentist, having endangered the life of VA patients, and having jeopardized and compromised the quality of VA patient care, and having failed to meet generally accepted standards of clinical practice as to raise reasonable concern for the safety of patients in order to suspend Petitioner's hospital privileges and report her to the State Licensing Authority.

As a result, the three aforesaid Dental Chiefs have successfully destroyed Petitioner's professional career and personal life by making her unemployable after dismissal from VA employment until she could get a name clearing decision which would expunge from her personal files their false allegations. The doctors are still maintaining that

there is nothing else to add to their extant records.

Dated May 21, 2005, Petitioner served and filed her Summons and Complaint in the United States District Court for the Southern District of New York which alleged *prima facie* should causes of action sounding in : I-racial and ethnic discrimination; II-violation of property and liberty rights without due process; III-common-law defamation per se; IV-common-law self publication defamation; V-intentional infliction of emotional distress; VI-tortious interference with employment and prospective business relationships; VII-malicious prosecution; VIII-abuse of process; and IX-violations of New York State Humans Rights Law Section 296.

In lieu of an Answer, Defendants-Appellees served the within motion to dismiss or in the alternative for summary judgment and to stay discovery.

At the point in time of the filing and service of her Summons and Complaint, Petitioner found herself in the unenviable position of having to defend her reputation against three VA Dental Chiefs, who would stop at nothing to further their nefarious ends. The corrupt Dental Chiefs have been proven to have lied, made unsubstantiated accusations and manufactured perjurious and defamatory evidence in their conspiracy to deprive Petitioner of her chosen occupation that Petitioner had invested a life time to build.

As part of their motion papers, Defendants-Appellees submitted as their Exhibit "C" to the declaration of their attorney submitted in support of the within motion, VA Regulations M-2, Part 1, Chapter 34

entitled "Release of Information Concerning Health Care Professionals to State Licensing Boards and to Prospective Employers".

In fact, in Exhibit C , Provision 34.03 states that the "VA has the obligation of responding to inquiries from State Licensing Board concerning the clinical practice of current employees" and provision 34.15 said "VA Health Care Facilities will provide accurate, timely and relevant information to State Licensing Boards in response to inquiries".

VA Bronx Authority's concealment of the Provision on Rules of Evidence applicable to reporting for each instance of failure to meet generally accepted standards of clinical practice which provision expressly requires indicating exactly what the individual did or did not do and the statements identifying the correct and accepted clinical practice standard for each instance of failure, VA Bronx Authority made both State Licensing Board and Petitioner unable to request the VA dentists involved to disclose their own standards or VA acccpted standards of care.

Should careful and judicious following of Exhibit C have been given to the State Licensing Board and to Petitioner (although the Exhibit C submitted by Defendants-Appellees is incomplete on the matter of evidence), Petitioner would not have to bear an ordeal from 1993 to today, inflicted on her by VA Bronx Dental Chiefs involved to destroy her professional career and professional life.

Despite its incompleteness, Exhibit C can pave the way for many valuable issues to be presented to the Court, since there is in Exhibit C the provision 34.03 saying that

'VA has the obligation of responding honestly to prospective employers regarding the clinical practice of former employees, and provision 34.15 saying VA health care facilities will provide accurate, timely and relevant information to prospective employers in response to inquiries, Petitioner would be entitled to pray the Court for instructing VA to take notice of the State Licensing Board's dismissal decision of all VA reported charges against her professional competence. That means when releasing information to her prospective employers about her termination for having been posing a danger to VA patients and because of her poor performance and poor clinical judgment , VA should honestly add that all those VA reported charges have been dismissed by the State Licensing Board. Without such information, Petitioner remains unable to seek employment in her chosen field.

Furthermore, Exhibit C with its provision on rules of evidence related to reporting of health care professionals' deficiencies demonstrates that there has been fraudulent concealment of material facts, and false misrepresentation of facts and misstatements related to VA charges reported to State Licensing Board, regarding the professional competence of Petitioner.

In light of the fraudulent concealment and misrepresentation there is conclusive evidence that Defendants-Appellees took affirmative steps to conceal their wrongful conduct.

A careful reading of the statute, with its provision on the rules of evidence will throw light on the malice and fiction on the part of VA Dental Chiefs involved because they would not (nor could they) be able to substantiate the

charges not yet presented to VA General Counsel for review but already presented to the Court as purported evidence of Petitioner's incompetence to justify their recommendation to terminate her employment with VA in 1993.

The statute, by its provision of rules on evidence reveals that in the instant case the discretionary authority utilized by the VA Officers involved has been flagrantly offensive to due process and other institutional guarantees and Petitioner has been, as a result, stigmatized by vicious, disproportionate punishment, coarse inequity and self indulgence. Thus, the Court should interfere and toll the statute of limitations governing court action.

Regarding the statute of limitations, the Court has ruled that for claim based on malicious prosecution, the limitations period starts to run only when the underlying criminal action is conclusively terminated See Singleton v City of New York, 632 F.2d 185,189 (2nd Cir. 1980). Although, State Licensing Board prosecution is not a criminal prosecution, it is not a civil prosecution. It is a quasi-criminal prosecution affecting a person's professional career, personal life and also livelihood.

So, the statute of limitations would be applicable to a claim based on malicious prosecution before the State Licensing Board. It follows that, logically and consequently, in the instant case, the claim has not been conclusively terminated by the Court. So, the statute of limitations is still running.

Thus, if the three VA dental chiefs involved are now unable to substantiate before the VA authorities any case

upon which they had based their recommendation to terminate Petitioner's VA employment to affirm that she "was posing a danger to VA patients", their failure will be their admission that they discriminate against this dentist in sheer violation of VA Code of Ethical Conduct requiring of employees honesty, integrity, impartiality and co-operation in making equal opportunity for all in a reality in the VA.

According to VA Policy on Penalties for the offenses of making false or unfounded statements which are defamatory about other VA personnel, and for the offense of misstatement or concealment of material fact in connection with employment or any investigation , inquiry or other proper proceeding, the penalty for those above offenses will be mandatory removal of the offenders from VA.

Concerning the other 9 charges that the three VA dental chiefs involved made VA Bronx authority to report to State Licensing Board after review of those charges by VA General Counsel and later on being unanimous dismissed by the Board , those charges are related to the findings of the three VA dental chiefs that this affected dentist was "unfit to work in VA, because of her poor clinical judgment and performance or because there are treatment planning, diagnosis and patient issue". Those VA dentists are now requested to re-submit their findings which must be based on the rules of evidence (set forth in the Exhibit C) as in effect at the time of this dentist 's employment in VA and not based on their malice or fiction, that means they should for each statement of identified charge clearly mention what Petitioner's assignment was, what she did or did not do and then they should state their

corrective actions that means what they would do in such identified cases, and explain why Petitioner was deficient, and the consequences of her deficiency on the patient.

The Court should bear in mind the ADA statement (putting aside the established rule of law in this matter) that "difference in diagnosis, treatment planning and patient management are not proof of malpractice because dentists are trained differently, and have different philosophy of treatment depending on their professional experience, educational background and knowledge of their own patients. Additionally, the charges based on the above-mentioned grounds must be affirmatively proved .

There were no complaints but only words of praise from patients for the dental services they received from this Petitioner (as it was mentioned in the EEOC decision). The three VA Dental Chiefs involved stated in their current declarations that they recommended termination of this geriatric dentist 's VA employment because of her poor performance and poor clinical judgment. They were repeatedly requested to show VA authorities the proof of their concerns, and their identified "poor performance and poor clinical judgment" of this dentist during her probationary period. They should show their corrective actions to the dentist's deficiencies as it is prescribed by VA Policy on Probationary and Trial Period. That Policy requires that supervisors demonstrate that every effort was made to provide employee with guidance, and corrective actions to employee's identified deficiencies and to explore with employee the reasons why deficiencies are occurring to formulate a plan of training, and develop a new one if the previous plan failed.

In the instant case, if the three VA Dental Chiefs refused or were otherwise unable to show evidence of Petitioner's poor clinical judgment in any identified case together with their corrective actions related to such identified deficiencies, their inability to affirmatively prove their allegations will be their admission of discrimination against this affected dentist, because according to VA Bylaws and Regulations on Probationary Period , it is prescribed that if during the Probationary Period, the employee demonstrates an acceptable level of performance and conduct, the employee will successfully complete the probationary period. Parenthetically, regarding the charge related to this geriatric dentist conduct as it is mentioned in the EEOC decision, it is the charge that the geriatric dentist did not share her experience and knowledge with residents.

In short, the three VA dental chiefs involved had blackened Petitioner's professional reputation to terminate her employment and make her unemployable since her dismissal in 1993 with their stigmatizing charge of having endangered the life of VA patients. Thus, they caused VA Bronx authority to report her to the State Licensing Board then they persistently refused to substantiate the charges they made against her . Finally, when Petitioner was given a opportunity to be heard by the State Licensing Board, the Board discovered that their charges were unfounded and dismissed those charges in June 2002. However, those three VA Dental Chiefs involved although they are dentists licensed by this State Licensing Board still are refusing to accept the findings of their own Board. It is easily apparent that the VA Defendants-Appellees' conspired in an attempt to destroy Petitioner's professional career and personal life for more than a

decade from 1993.

For the reasons set forth more fully below, it is respectfully prayed that this Honorable Court reverse the Memorandum Decision and Order of the District Court and the affirmance of the Second Circuit so that the improper and illegal actions of Defendants-Appellees can come to light at trial of the matter.

REASON FOR THE ALLOWANCE OF THE WRIT

IT IS RESPECTFULLY SUBMITTED THAT THIS HONORABLE COURT REVIEW THE SECOND CIRCUIT COURT OF APPEALS AFFIRMANCE OF THE MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING PETITIONER'S COMPLAINT BECAUSE THERE ARE ISSUES OF FACT INAPPROPRIATE FOR DISMISSAL.

As the United States Supreme Court stated in its seminal case, Conley v. Gibson, 355 U.S.41, 78 S.Ct. 99, 2 L.Ed. 80 (1957), "in appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief", See Lipsky v. Commonwealth United, 551 F.2d 887 (2d Cir. 1984) See Ryder Energy v. Merrill Lynch, 748 F.2d 774 (2d Cir. 1984).

The Conley Court continues, "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the Defendants fair notice of what the Plaintiff's claim is and the grounds upon which it rests Id at 355 U.S. 41, 47. See Fed. R. Civ. Proc. 8 (a) 2. The Federal Rules of Civil Procedure erects a powerful presumption against rejecting pleadings for failure to state a claim.

Under Conley, an appellate court, in reviewing an order of the District Court Judge, which dismissed a complaint under Federal Rule of Civil Procedure ("FRCP") 12 (B) 6, must construe the complaint in question in favor of the Plaintiff therein, and only affirming the dismissal of the complaint if it "appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim, which would entitle him to relief" Conley v. Gibson, 355 U.S.41, 78 S.Ct. 99, 2 L.Ed. 80 (1957).

During the pleadings phase in litigation, the appropriate inquiry is not whether a Plaintiff is likely to prevail, but whether he or she is entitled to offer evidence to support his or her claims See Thompson v. Carter, 284 F.3d 411 (2d Cir 2002); See also Chance v. Armstrong, 143 F.3d 698 (2d Cir. 1998). The District Court below and the Second Circuit on appeal denied a continuing course of discrimination's tolling of the statute of limitations. It is respectfully submitted that the two Courts' determinations was an abuse of its discretion under the favorable light granted to the non-movant facing dismissal. This Court is empowered to review said determination See Zerilli-Edelglass v. New York, 333 F.3d 74 (2d Cir. 2003).

The Supreme Court has unambiguously stated that the filing of a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling See Paese v. Hartford Life Accident Insurance,449 F.3d 435 (2d Cir. 2006).

When evaluating the sufficiency of a Plaintiff's claim under FRCP 12(b)6, a court is limited to the factual allegations set forth in the complaint, which are accepted as true, any documents attached to the complaint as exhibit or incorporated into it by reference, and to documents in the Plaintiff's possession or of which the Plaintiff had knowledge and relied on in bringing the action.

The court must draw all reasonable inferences in favor of the Plaintiff, particularly where the Plaintiff has submitted her complaints alleging civil rights violations.

In the employment discrimination context, and of special relevance in the case herein, the issue of whether discrimination in fact occurred, generally presents an issue of fact inappropriate for dismissal on the pleadings since discrimination, much like the acts of the VA Dental Chiefs against Petitioner as alleged in her complaint, is often accomplished and can be effectively disguised by devious and often subtle means Compare Forrest v. Jewish Guild, 309 A.D.2d 546, 765 N.Y.S.2d 326 (1st Dept 2003).

A Plaintiff who files a timely EEOC charge about a particular discriminatory act committed in furtherance of ongoing discrimination, extends the applicable limitations for claims of discriminatory acts committed under that continuation even if those acts, standing alone would have been barred by the statute of limitations. See Lightfoot v. Union Carbide, 110 F.3d 898 (2d Cir. 1997). As the court in Lightfoot reasoned, since such continuing incidents are specifically related and are allowed to continue unremedied, the continuing violation exception is available.

Petitioner's claims are specifically based on a course of action arising from the fact that the Defendant-Appellees violated Petitioner's constitutional right to a liberty interest in finding employment after VA termination without due process of law. Clearly, Petitioner was never given the opportunity to review the charges in her personnel folder as is her right and Petitioner was never given the opportunity to be heard in response to the charges being surreptitiously listed in her folder. VA Bronx Dental Chiefs Sabol and Petrazzuolo falsely accused Petitioner's of having endangered the lives of VA patients. Although eventually being cleared of all charges, Petitioner was repeatedly denied a name clearing hearing or any other opportunity to take such false charges off her record.

Defendant-Appellee Chairman Bergen's persistent refusal to indicate with specificity the basis for the actions taken against Petitioner comprises a continuing discriminatory violation, preventing her from seeking future employment without any basis in fact, such a continuing violation that continues to harm Petitioner to this day and should His Honor's Memorandum Decision and Order below and the second Circuit Court of Appeals affirmance stand, will continue to harm her forever.

Where continuing violation can be shown, the Plaintiff is entitled to bring suit challenging all conduct that was a part of that violation, even conduct that occurred outside the limitations period.

Unlike equitable tolling, which is invoked in cases where a Plaintiff is ignorant of his cause of action due to a Defendant's fraudulent concealment, equitable estoppel is

invoked in cases where a Plaintiff knew of the existence of a cause of action but the Defendant's conduct caused him to delay in bringing his lawsuit See Cerbone v. International Ladies' Garment Workers, 768 F.2d 45 (2d Cir. 1985).

In the within matter, the VA Dental Chiefs deliberately violated VA Standards of Ethical Conduct, VA Policy on Probationary Period and VA By Laws and Regulations on hospital privileges in total disregard for the rights of Petitioner, in order to discriminate against her on the basis of her origin in their illicit attempts to prevent her from continuing in dental practice.

The aforesaid chiefs, purposely destroyed Petitioner's professional career ostensibly shielded by purported governmental immunity. In the instant matter, Defendants-Appellees improperly charged Petitioner with professional deficiencies and were found unable to state what they would do in similar conditions and circumstances, because all of said allegations were fictional creations asserted with malice aforethought.

VA standards of ethical conduct require of federal employees, honesty, integrity, impartiality and ethical conduct. VA employees must avoid any action that may result in making a governmental decision without authority, or lowering the public's confidence in the government or its auspices.

In the case at bar, the facts alleged in Petitioner's complaint purport to show that the VA Dental Chiefs involved violated the standards of ethical conduct and responsibility in their attempt to destroy, at their own

discretion, the professional career of Petitioner by misleading the VA reviewing authorities into believing their falsely defamatory statements (eventually proven to be lies) and their intentional misstatements and their concealment of material facts and in connection with the ensuing investigation.

United States Supreme Court has recognized that an employee has a legitimate interest to seek other employment without being unfairly deprived of the liberty to do so. Such an unfair infringement of an employee's liberty interest occurs when the circumstances of his or her discharge result in the publication of information that is false and stigmatizing and which has the effect of curtailing future freedom of choice or action.

In Board of Regents v. Roth, 408 U.S.564, 92 S.Ct 2701, 33 L.Ed 2d 548 (1971), Supreme Court has indicated that for statements to be "stigmatizing", they must rise to a level serious enough as to place the employee's good name , reputation, honor or integrity at stake. Discharge from nontenured public employment under circumstances that put an employee's reputation, honor or integrity at stake gives rise to a protectable liberty interest and a procedural opportunity to clear the cloud cast upon one's good name See Zinermon v. Burch, 494 U.S. 113, 110 S.Ct 975, 108 L.Ed 100 (1990).

To allow Defendants-Appellees to get away with their campaign of discrimination against Petitioner is to ignore her unalienable right to seek employment without a cloud cast upon her by defamatory and false accusations left unopposed.

For just that reason, the Honorable Court should have reversed the District Court's dismissal of her complaint and the case should be left to a trial of the facts to uncover the mistreatment and pervasive discrimination.

Though ordinarily, an applicable imitations period starts to run on employer's commission of an unlawful act and is not tolled pending the employee's realization that the conduct was discriminatory, a court may, in some cases, permit tolling as a matter of fairness. For example, as is the case herein, equitable tolling is available to be applied to relieve a Plaintiff such as Petitioner, who was actively misled by her employers and was prevented in extraordinary ways from exercising her rights See Miller v. I T & T, 755 F.2d 20 (2d Cir 1985). Generally, the applicability of equitable tolling depends on matters outside of the pleadings, so it is rarely appropriate to grant a FRCP 12 (b)6 motion to dismiss if equitable tolling is at issue See Hoffkins v. Monroe, 2007 U.S. Dist LEXIS 32313 (W.D.N.Y 2007)(dismissal motion denied). Under federal law, an action normally accrues at the time of injury See Kronisch v. United States, 150 F.3d 112 (2d Cir. 1998). However, as with most of the rules, there are exceptions. Specifically, where a Plaintiff would reasonably have had difficulty discerning the fact, extent or cause of injury, at the time it was inflicted, a discovery rule of accrual applies See Singleton v. City of New York, 450 U.S. 920, 67 L.Ed. 347, 101 S.Ct. 1368 (1981). Under this rule of accrual, a statute of limitations is postponed until a Plaintiff has or should have discovered the critical facts of his or her injury, its extent and its cause.

Accordingly, a reviewing Court's inquiry must then be directed at the evidence submitted by a Defendant.

The question, upon review is whether the evidence that has been submitted by a moving Defendant was sufficient to put a responding Plaintiff on notice, that would allow the party to discover the extent of the injury occasioned by the Defendants' actions. If the answer is in the negative, the court is constrained to read the facts of the case in a light most favorable to the nonmoving Plaintiff and deny dismissal or summary judgment as the case may be.

At this stage of the litigation, the burden falls squarely on the shoulders of the moving Defendant. The Defendant has the burden of showing that a Plaintiff, exercising reasonable diligence, would have discovered the fraudulent scheme and the extent of his or her injuries. Here, one can clearly see, that Petitioner had no way of discerning the fraudulent cooperation of the above named Defendants and the impact their conspiratorial process would have on her re-entering the job market in her chosen field. In this case, whether the Petitioner was put on proper notice through the Defendants' actions in order to discover the extent of her injuries presents a clear question of fact inappropriate for dismissal at this juncture.

The Defendants herein are attempting to charge Petitioner with the knowledge that she should have known that, although innocent of the charges brought against her on the basis of her gender, age and or ethnicity, the mere fact that such charges were brought, albeit fraudulently, was enough to ground her career.

The emphasis should not be placed on a mere continuity of discrimination, but the critical question is whether any present violation exists See generally Olson

v. Rembrandt Painting, 511 F.2d 1228 (8th Cir. 1975). By effectively shielding Petitioner from reentering the job market through the aforesaid dental chiefs' conspiracy, Defendants-Appellees extended their discrimination against Petitioner through, to, and beyond the present. Although innocent of the charges brought against her, Petitioner was and remains forced to suffer the stigma of the charges much as if they were wholly true. For just this reason alone, the statute of limitations should be postponed, the discovery rule applied, and dismissal reversed, so that Petitioner will finally have the ability an opportunity to overturn the heinous treatment intentionally grounding her career. This specific determination must be made on a case-by-case basis and should be applied herein See Delaware State College v. Ricks, 449 U.S. 250, 66 L.Ed. 431, 101 S.Ct. 498 (1980).

The conspiracy charged above is clearly a "pattern of practice of discrimination" because Defendants-Appellees contemporaneously coordinated their intentional activity to deprive this Asian dentist of the ability to reenter the job market of her choice. By lying and attempting to hold as truth, false charges and allegations, Defendants-Appellees intentionally worked together against the innocent Petitioner who should not in good conscience be allowed to garner the intent that they maliciously set out to acquire with their conspiratorial activity. The specific, detailed factual basis for the within charge of conspiracy against Defendants-Appellees should suffice to withstand any attack on Petitioner's court action by virtue of her inability to discover the extent of the damages and difficulties heaped upon her by such conspiracy by the guilty Defendants-Appellees.

While time limitations are important in all actions, especially those sounding in employment discrimination cases, in all fairness, they must be tolled where confusion caused by intentional activities of an employer causes impossible difficulties to the party was claimed is sort to be barred See Archer v. Globe Motorists, 833 F.Supp 211 (SDNY 1993). The Honorable lower Court, recognizing the liberal construction of Title VII should have conducted a more thorough examination of the facts in a determination that reasonable grounds existed for an equitable tolling of the filing period See Baldwin County Welcome Center v. Brown, 466 US 147, 80 L.Ed. 2d 196, 104 S.Ct. 1723 (1984). Under this delayed accrual analysis, the cause of action sought to be dismissed herein, would be delayed in its accrual due to the fact that Petitioner was systematically prevented from discovering the consequences of the conspirators' actions intentionally set into motion against her.

Under this doctrine of equitable tolling, the relevant statute of limitations should not be charged against Petitioner as running, because she was unaware of the extent of the attack on her career, due to the Defendants-Appellees' conduct in concealing the consequences of their defamatory actions, without due process of law.

The Second Circuit has routinely held that substantive due process protects against government action that is arbitrary, conscience shocking, or oppressive in a constitutional sense See Kaluczky v. City of White Plains, 57 F.3d 202 (2d Cir. 1995). To properly state a claim of denial of substantive due process in the connection with termination of employment, as here, the employers'

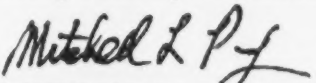
conduct is clearly shown to be arbitrary and intentionally abusive See McClary v. O'Hare, 786 F.2d 83 (2d Cir. 1986).

Though ordinarily, an applicable imitations period starts to run on employer's commission of an unlawful act and is not tolled pending the employee's realization that the conduct was discriminatory, a court may, in some cases, permit tolling as a matter of fairness. For example, as is the case herein, equitable tolling is available to be applied to relieve a Plaintiff such as Petitioner, who was actively misled by her employers and was prevented in extraordinary ways from exercising her rights See Miller v. I T & T, 755 F.2d 20 (2d Cir 1985). Generally, the applicability of equitable tolling depends on matters outside of the pleadings, so it is rarely appropriate to grant a FRCP 12 (b)6 motion to dismiss if equitable tolling is at issue See Hoffkins v. Monroe, 2007 U.S. Dist LEXIS 32313 (W.D.N.Y 2007)(dismissal motion denied).

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,



MITCHELL E. PERRY, ESQ.
2566 Wilson Avenue, #1
Bronx, New York 10469
(718) 881-9008

Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United, States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 14th day of August, two thousand and nine,

Hoa T. Nghiem,

Plaintiff-Appellants,

ORDER
Docket Number
06-5228-cv

United States Department of Veterans Affairs, Mary Ann Musumeci, individually, and as Deputy Director Bronx Veterans Administration Medical Center, Dr. Gerald F. Sabol, individually, and as Bronx Veterans Administration Medical Center Dental Chief, Dr. Vincent Petrazzuolo, individually and as Dentistry Assistant Chief, Bronx Veterans Administration Medical Center, Dr. Stephen F. Bergen, individually, and as Manhattan Veterans Administration Medical Center Dental Chief,

Defendants-Appellees.

Hoa T. Nghiem having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By:
Frank Perez, Deputy Clerk

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of March, two thousand nine.

PRESENT:

HON. GUIDO CALABRESI,
HON. RICHARD C. WESLEY,
Circuit Judges,
HON. CHRISTOPHER F. DRONEY,*
District Judge.

Hoa T. Nghiem,

Plaintiff-Appellant,

v. 06-5228-cv

Unites States Department of Veterans Affairs, Mary Ann Musumeci, individually, and as Deputy Director Bronx Veterans Administration Medical Center, Dr. Gerald F. Sabol, individually, and as Bronx Veterans Administration Medical Center Dental Chief, Dr. Vincent Petrazzuolo, individually and as Dentistry Assistant Chief, Bronx Veterans Administration Medical Center, Dr. Stephen F. Bergen, individually, and as Manhattan Veterans Administration Medical Center Dental Chief,

Defendants-Appellees.

FOR APPELLANT: Hoa T. Nghiem, pro se, Silver Spring, MD.

FOR APPELLEES: John P. Cronan, United States Attorneys Office, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Holwell, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Appellant Hoa T. Nghiem, *pro se*, appeals the district court's dismissal of her complaint alleging violations of, *inter alia,* Title VII and 42 U.S.C. §§ 1981 and 1983. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review *de novo* a district court decision dismissing a complaint pursuant to Rule 12 (b)(1) or (6). See *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam) (Rule 12(b)(1)); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (Rule 12(b)(6)). In each instance, we "construe[] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Chambers*, 282 F.3d at 152; see also *Triestman*, 470 F.3d at 474.

---

*The Honorable Christopher F. Droney, of the United States District Court for the District of Connecticut, sitting by designation.

Prior to bringing suit under Title VII, "a federal government employee must timely exhaust the administrative remedies at [her] disposal." *Belgrave v. Pena*, 254 F.3d 384, 386 (2d Cir. 2001) (per curiam) (quotation marks omitted). After the formal filing with the Equal Employment Opportunity Commission ("EEOC"), the employee is authorized to file a civil action in federal court (1) within 90 days of receiving notice of final administrative decision, or (2) within 180 days from the date of filing the complaint if there has been no administrative action. *See* 29 C.F.R. § 1614.407; 42 U.S.C. § 200e-16(c); *Belgrave*, 254 F.3d at 386. Here, Nghiem does not contest that she filed suit more than seven years after the final administrative decision, but instead argues that her claim should be subject to the continuing violations doctrine.

"Under the continuing violation exception to the Title VII limitations period, if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone." *Patterson v. County of Oneida, N.Y.*, 375 F.3d 206, 220 (2d Cir. 2004) (internal quotation omitted). Properly raised, a claim of a "continuous practice and policy of discrimination" would permit the limitations period to run from the date of the "last act" of discrimination, for example, a refusal to reinstate the plaintiff. See *Cornwell v. Robinson*, 23 F.3d 694, 703-04 (2d Cir. 1994). As conceived, the continuing violations doctrine thus allows a plaintiff to bring an otherwise untimely claim where she has alleged a timely claim that is part of an ongoing policy of discrimination, and it does not allow a plaintiff to bring an untimely suit in federal court after timely filing claim based on the defendant's actions with the

EEOC. Accordingly, the district court properly found Nghiem's Title VII claims untimely.

To the extent Nghiem argues that she should be entitled to equitable tolling, she failed to raise this argument before the district court, and, more importantly, she has not alleged any extraordinary circumstances or that she was misled or prevented from filing a timely claim warranting equitable tolling. See *Miller v. Int'l Tel. & Telegraph Corp.*, 755 F.2d 20, 24 (2d Cir. 1985) (placing the burden of showing "extraordinary" circumstances justifying equitable tolling of a time bar in an employment discrimination suit on the employee-plaintiff).

With respect to Nghiem's §§ 1981 and 1983 claims, the district court properly dismissed them because the statutes apply only to state actors, and not federal officials. *See Dotson v. Griesa*, 398 F.3d 156, 162 (2d Cir. 2005) (§ 1981); *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 30 n.4 (2d Cir. 1991) (holding that "[a]n action brought pursuant to 42 U.S.C. §1983 cannot lie against federal officers").

We have considered the remainder of Nghiem's claims and found them to be without merit. Accordingly we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: Frank Perez

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

----------x

HOA T. NGHIEM, D.D.S.,

Plaintiff,

-against-

05 Civ, 5396
(RJH)

UNITED STATES DEPARTMENT OFVETERAN AFFAIRS, MARY ANN MUSUMECI, individually, and as Deputy Director Bronx Veterans Administration Medical Center, DR. GERALD F. SABOL, individually, and as Bronx Veterans Administration Medical Center Dental Chief, DR. VINCENT PETRAZZUOLO, individually, and as Dentistry Assistant Chief, Bronx Veterans Administration, DR. STEPHEN F. BERGEN, individually, and as Manhattan Veterans Administration Medical Center Dental Chief,

Defendants.

----------x

MEMORANDUM OPINION AND ORDER

This action arises out of plaintiff's former employment as a geriatric dentist at the Veteran Affairs Medical Center in Bronx, New York. Dr. Nghiem's employment was terminated in 1993. Named as defendants in this action are the United States Department of Veterans Affairs ("VA"), an agency of the federal government of the United States, and four of plaintiff's individual supervisors in their official and individual capacities. In her

complaint, plaintiff alleges the following nine causes of action: (1) racial and ethnic discrimination in the termination of her employment in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981, (2) violation of property and liberty rights without due process under the Civil Rights Act of 1871, 42 U.S,C. § 1983, (3) common law defamation per se, (4) common law self-publication defamation, (5) intentional infliction of emotional distress, (6) tortious interference with employment and prospective business relationships, (7) malicious prosecution, (8) abuse of process, and (9) violation of section 296 of New York State Human Rights Law, N.Y. Exec. Law § 296 (McKinney 2005). Plaintiff does not identify as a separate cause of action any claim under Title VII, but makes reference to violations under the Civil Rights Act of 1991, 42 U.S.C. § 2000e in her complaint. (Comp ¶1.)

Defendants now move to dismiss the complaint in its entirety pursuant to Rule 12(b)(1) and Rule 12(b)(6), or, in the alternative, for summary judgment pursuant to Rule 56, and to stay discovery pending the Government's dispositive motion. Fed. R. Civ. P. 12, 56. For the reasons outlined below, defendants' motion is GRANTED.

BACKGROUND

The following facts, alleged in plaintiff's complaint, are taken as true for purposes of the Court's consideration of the instant motion.

Plaintiff is an Asian-American female of Vietnamese descent. (Compl. ¶ 4.) She has a Doctor of Dental degree ("DDS") from Georgetown University Dental School, Washington, D.C., a Masters Degree of Dentistry from New York University Dental School in periodontics, and a Certificate of Specialty in prosthodontics from Boston

University. (*Id.*) She has also completed a UCLA fellowship in geriatric dentistry at the Veterans Administration Medical Center in Los Angeles. (*Id.*) In addition, she has a foreign DDS and advanced degrees from institutions in Vietnam and Paris, France. (*Id.*) She was employed as a geriatric dentist by the United States Veterans Administration Medical Center, located in Bronx, New York, from September 20, 1991 until September 17, 1993, just prior to the expiration of her two-year probationary period. (*Id.*) Plaintiff alleges that her supervisors, the individually named defendants, wrongly accused her of substandard dental treatment, illegally withheld her evidence from subsequent administrative proceedings, and suspended her hospital privileges, all of which ultimately culminated in her wrongful termination.. (Id. at ¶ 11.). Plaintiff alleges that her 1993 termination was the result of discrimination on the basis of race and ethnicity. (*Id.*) Since her termination in 1993, plaintiff has been unable to find comparable, or indeed any, employment as a dentist. (*Id.* at ¶12.)

Finally, plaintiff has requested that defendants clear her personnel record, pursuant to an order issued by the University of the State of New York's Board of Regents on June 18, 2002 adopting findings made by the Regents Review Committee that "respondent is not guilty of the specifications charged."[1] (*Id.* at ¶13; June 18, 2002 Order No. 17429 by University of the State of New York, attached as Compl. Ex. A.) In response to this request, plaintiff received a determination dated March 8, 2005 from the Department of Veterans Affairs Regional Counsel refusing to clear plaintiff's personnel file, (Compl. ¶10.)

---

[1] The "specifications charged" are not identified in the Order, or anywhere in the complaint.

Defendants have now moved to dismiss the complaint in its entirety pursuant to Rule 12(b)(1) and Rule 12(b)(6), or in the alternative, for summary judgment pursuant to Rule 56. In support of their motion, defendants assert a myriad of jurisdictional, statute of limitations, and substantive defenses to plaintiffs complaint. The Court finds that. plaintiff's claims must all be dismissed for lack of subject matter jurisdiction, as barred by the applicable statutes of limitations, or both, and therefore declines to convert this motion to dismiss to one for summary judgment and addresses only arguments related to these bases for dismissal.

DISCUSSION

1. Standard of Review

A motion to dismiss pursuant to Rule 12 must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes*, 416 U.S. 232, 236, (1974) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, (1957)). For the purposes of a Rule 12 motion, all well pleaded allegations are accepted as true, and all inferences are drawn in favor of the pleader. *Mills v. Polar Molecular Corp.*, 12 F,3d 1170, 1174 (2d Cir. 1993).

"The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). In other words, "'the office of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" *Eternity Global Master Fund Ltd. v.*

Morgan Guar. Trust Co. of New York, 375 F.3d 168, 176 (2d Cir. 2004) (quoting *Geiger v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980)). Dismissal is only appropriate when "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." *Sweet v. Sheahan*, 235 F.3d 80, 83 (2d Cir. 2000); *accord Eternity Global Master Fund*, 375 F.3d at 176-77.

a. Rule 12 (b) (1)

A case must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000), A plaintiff asserting subject matter jurisdiction generally has the burden, once challenged, of providing by a preponderance of the evidence that jurisdiction exists. *See id.*

b. Rule 12(b)(6)

A motion to dismiss on statute of limitations grounds generally is treated as a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), as opposed to under Rule 12(b)(1). *See Ghartey v. St. John's Queens Hospital,* 869 F.2d 160, 162 (2d Cir. 1989); *Carrasco v. New York City Off-Track Betting Corp.,* 858 F.Supp. 28, 30 (S.D.N.Y.1994). Rule 12(b)(6) provides the most appropriate legal basis for a motion to dismiss on such grounds, because expiration of the statute of limitations presents an affirmative defense. See Fed. R. Civ. P. 8(c); *Bano v. Union Carbide Corp.*, 361 F.3d 696, 710 (2d Cir. 2004) ("The statute of limitations is normally an affirmative defense....."); *Pani v. Empire Blue Cross Blue Shield*,

152 F.3d 67, 74 (2d Cir. 1998) ("An affirmative defense may be raised by a pre-answer motion to dismiss under Rule 12(b)(6), without resort to summary judgment procedure, if the defense appears on the face of the complaint."). An affirmative defense can arise when plaintiff adequately states a claim, but "plaintiffs own allegations show that the defense exists." Wright & Miller, Federal Practice and Procedure; Civil 2d § 1357 (1990). The standards and procedures under Rule 12(b)(6) thus aptly apply to motions to dismiss upon the affirmative defense of statute of limitations. "The Court's function on a Rule 12(b)(6) motion is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Festa v. Local 3, Int'l Brotherhood of Elec. Workers*, 905 F.2d 35, 37 (2d Cir. 1990).

"When determining the sufficiency of plaintiff['s] claim for Rule 12(b)(6) purposes, consideration is limited to the factual allegations in [the] complaint, documents attached to the complaint as an exhibit or incorporated in it by reference, matters of which judicial notice may be taken, or documents either in plaintiff['s] possession or of which plaintiff[ ] had knowledge and relied in bringing suit." *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). When a party submits additional evidence to the Court in connection with a motion to dismiss, the Court must convert the motion to dismiss into a motion for summary judgment or exclude the extraneous documents from consideration. *See* Fed. R. Civ. P. 12(b); *Fonte v. Bd. of Managers of Cont'l Towers Condo.*, 848 F.2d 24, 25 (2d Cir. 1988). The Second Circuit has held, however, that "when a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint," the court

may nevertheless take that document into consideration in deciding the defendants' motion to dismiss, without converting the motion into one for summary judgment. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991).

2. Section 1981

Plaintiff alleges that her termination was the result of racial and ethnic discrimination in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981. However, § 1981 does not provide a basis for the relief plaintiff seeks, "'Title VII is the *exclusive* remedy for [employment] discrimination by the federal government on the basis of race, religion, sex, or national origin.'" *Lewis v. Snow,* 01 Civ. 7785 (CBM), 2003 WL 22077457, at *9 (S.D.N.Y. Sept. 8, 2003) (citing *Briones v. Runyon*, 101 F.3d 287, 289 (2d Cir. 1996) (quoting *Boyd v. United States Postal Serv.*, 752 F2d 410, 413-14 (9th Cir. 1985))); *see also Brown v. Gen. Serv. Admin.,* 425 U.S. 820; 835 (1976) ("[T]he Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment."). By its terms, § 1981 protects contract rights "against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C § 1981(c). "The plain language of the statute 'very plainly does not include actions taken under color of federal law.'" *Lewis*, 2003 WL 22077457, at *9 (quoting *Graham v. United States Postmaster Gen.*, 99 Civ. 0289 (LEK), 2001 WL 118591, at *3 (N.D.N.Y. Feb. 2, 2001)). Furthermore, the United States has not consented to be sued under § 1981. *Id.* (citing *Callis v. Shannon*, 93 Civ. 4983 (RPP), 1994 WL 116007, at *2 (S.D.N.Y. Mar. 28, 1994)). Courts in this circuit consistently dismiss claims under § 1981 brought by federal employees alleging

employment discrimination against their federal employers and their individual supervisors or co-employees. *See Lewis,* 2003 WL 22077457, at *9 (dismissing § 1981 action alleging hostile work environment and retaliation claims for lack of subject matter jurisdiction as against the Secretary of the Treasury and an. individual customs inspector); *King v. United States Postal Serv.,* 01 Civ. 8876 (GEL), 2002 WL 1067825, at *3 (S.D.N.Y. May 29, 2002) (dismissing § 1981 claim alleging a hostile work environment against United States Postal Service and plaintiff's immediate supervisor); *Bumpus v. Runyon*, 94 Civ. 2570 (DC), 1997 WL 154053, at **3-4 (S.D.N.Y. Apr. 2, 1997) (dismissing § 1981 and §1983 claims alleging sex discrimination and retaliation claims as preempted by Title VII); *Hughes v, United States Postal Serv.,* 700 F.Supp, 779, 783 (S.D.N.Y. 1988) (dismissing § 1981 claim because "Title VII and Rehabilitation Act provide the sole remedies for federal employees' allegations of employment discrimination"); *Marshall-Screen v. I.R.S.*, 01 Civ. 0811 (FB), 2002 WL 264999, at *2 (E.D.N.Y. Feb, 26, 2002) (dismissing § 1981 claim alleging employment discrimination as preempted by Title VII); *Parola v. I.R.S.*, 98 Civ. 7179 (JG), 1999 WL 1215557, at *7 (E.D.N.Y. Dec. 15, 1999) (same).

In addition, even if plaintiff's § 1981 claim for discriminatory termination was an otherwise cognizable cause of action, it would be barred as untimely. Section 1981 causes of action created by the 1991 amendments are subject to a "catch-all" four-year statute of limitations. 28 U.S.C. § 1658; *see also Jones v. R. R. Donnelly & Sons Co.*, 541 U.S. 369, 379-81 (2004); *Copeland v. New York City Bd. of Ed.*, 03 Civ. 9978 (DAB), 2005 WL 3018267, at *4 (S.D.N.Y. Nov. 8, 2005) (noting that claims of wrongful termination fall under § 1658 because they

are created. by the 1991 amendments to § 1981).[2] Section 1981 claims for wrongful termination accrue on the date the employer notifies the employee that he is being terminated. *Copeland*, 2005 WL 301267, at *4. In this ease, plaintiff s termination occurred in 1993, almost twelve years before the current action was filed. Plaintiffs claim under § 1981 is dismissed.

3. Section 1983

Plaintiff purports to state a claim under 42 U.S.C. §1983 because the reasons given for her termination by her direct supervisors, defendants Sabol, Petrazzuolo, Musumeci, and Bergan, were allegedly false and defamatory, constituting a deprivation of plaintiff's property and liberty interests without due process. (Compl. ¶ 21.) Plaintiff fails to state a claim under § 1983 because, like §1981, that statute only provides redress for federal statutory and constitutional violations perpetrated under color of *state* law. Actions of the federal government or its officers are exempt from the proscriptions of § 1983. *See Kingsley v. Bureau of Prisons*, 937 F.2d 26, 30 n.4 (2d Cir. 1991) ("[A] prerequisite for relief under § 1983, which concerns the deprivation of rights, privileges, and immunities secured by the Constitution and federal laws, is that the defendant acted under color of state law. An action brought pursuant to 42 U.S.C. § 1983 cannot lie against federal officers.") (internal citations omitted); *Marshall v. Nat'l. Assoc. of Letter Carriers Br.* 36, 00 Civ. 3167 (LTS), 2003 WL 223563, at *6

---

[2] Section 1981 claims *not* created by the 1991 amendments are governed in New York by the New York residual three-year statute of limitations for personal injury claims. *See Harmon v. Patrolman's Benevolent Assoc.*, 05 Civ. 0589 (FB), 2005 WL 2847256, at *2 (E.D.N.Y. Oct. 31, 2005) (citing *Mian v. Donaldson, Lufkin. & Jenrette Secs. Corp.*, 7 F.3d 1085, 1087 (2d Cir, 1993)).

(S.D.N.Y. Feb. 3, 2003) (dismissing § 1983 claim against the United States Postal Service and individual government employees for lack of subject matter jurisdiction); *Bumpus v. Runyon*, 94 Civ. 2570 (DC), 1997 WL 154053, at **3-4 (dismissing § 1981 and § 1983 claims alleging sex discrimination and retaliation claims as preempted by Title VII).

Even if plaintiff's purported cause of action under § 1983 were cognizable against these defendants, it would be barred as untimely. The applicable statute of limitations for § 1983 actions in New York is three years. *Owens v, Okure*, 488 U.S. 235, 249-50 (1989) (holding that § 1983 claims are governed by a state's residual or general personal injury statute of limitations); *Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004); *Sackey v. City of New York*, 04 Civ. 2775 (WHP), 2006 WL 337355, at *4 (S.D.N.Y. Feb. 15, 2006); see also N.Y. C.P.L.R. 214(5) (McKinney 2003) (providing that New York statute of limitations for personal injury claims is three years). A cause of action under § 1983 begins to accrue "'when the plaintiff knows or has reason to know of the injury which is the basis of his action,'" *Radin v. Albert Einstein Coll. of Med. of Yeshiva Univ.*, 04 Civ. 0704 (RPP),2005 WL 1214281, at *17 (S.D.N.Y. May 20, 2005) (quoting *Pearl v. City of Long Beach*, 296 F.3d. 76, 80 (2d Cir. 2002); *Harris v. City of New York*, 186 F.3d 243, 247-48 (2d Cir. 1999)); Therefore, even if § 1983 were the appropriate vehicle for a cause of action alleging the deprivation of a cognizable liberty interest without clue process arising out of the inclusion of reasons for termination in a federal employee's personnel file, it is untimely. Plaintiff has known of the injury underlying her claim since 1993. This claim is dismissed.

4. Title VII

Although plaintiff does not specifically identify Title VII as the basis for any of her causes of action in her complaint, Title VII is cited in the complaint (Compl. ¶1), and is the sole subject of plaintiff's memorandum in opposition to defendants' motion to dismiss. Therefore the Court will discuss, for the sake of thoroughness, why any claims arguably brought under Title VII must be dismissed.

First, dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) would be appropriate with respect to any Title VII claims arising out of plaintiff's termination because plaintiff has not named the appropriate party defendant. Under Title VII, a federal employee may bring suit in which "the head of the department, agency, or unit, as appropriate, shall be the defendant." 42. U.S.C. §2000e-16(a) (2000). In the case of the United States Department of Veteran Affairs, the appropriate defendant for a Title VII action is the secretary of the department, James Nicholson, in his official capacity. The United Stated Department of Veteran Affairs as an entity, therefore, is not an appropriate defendant. Furthermore, the individual defendants with supervisory control may not be held personally liable under Title VII.. *See, e.g., Mandell v. County of Suffolk*, 316 F.3d 368, 377 (2d Cr. 2003) (affirming dismissal of claims against individual supervisors in their personal capacity because they are not subject to liability under Title VII); *Wrighten v. Glowski*, 232 F.3d. 119, 120 (2d Cir. 2000) (per curiam); *Tomka v. Seiler*, 66 F.3d 1295, 1314 (2d Cir. 1995), *abrogated on other grounds, Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Dawson v. County of Westchester*, 351 F.Supp.2d 176, 192 (S.D.N.Y. 2004). Because plaintiff has not named an appropriate defendant to sustain a cause of action under Title VII, any claim

that might be construed to arise under Title VII must be dismissed.

Even if plaintiff had clearly articulated a Title VII cause of action, and had named the appropriate party as defendant, her claim would be time-barred. The requirement that a plaintiff timely exhaust administrative remedies is not a jurisdictional prerequisite to filing suit in federal court, and should be treated as a statute of limitations. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). The Equal Employment Opportunity Commission ("EEOC") has promulgated regulations establishing the applicable administrative procedures that a federal employee must exhaust before resorting to federal court. They require that the aggrieved employee, *inter alia*, (1) consult with a counselor at the relevant agency's Equal Employment Office ("EEO") within forty-five days of the alleged discriminatory act, 29 C.F.R. § 1614.105(a)(1), and if the matter is not resolved after a mandatory counseling period, (2) file a formal written administrative complaint ("EEO complaint") within fifteen days of receipt of the EEO counselor's notice of final interview and right to file a formal complaint ("EEO notice"), 29 C.F.R. § 1614.106(a)—(b). The employee may then file a civil action (i) within ninety days of notice of a final agency decision on his or her EEO complaint, or (ii) after 180 days from the filing of the EEO complaint if the agency has not yet rendered a decision. *See* 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614,408(a)—(b); *see also Belgrave v. Pena*, 254 F.3d 384, 386 (2d Cir. 2001) (discussing foregoing prerequisites to filing suit in federal court).

In this case, plaintiff filed a timely EEO complaint challenging her employer's decision to terminate her employment. On September 18, 1996, the EEOC affirmed the final agency decision

terminating her employment. *See Nghiem*, Appeal No. 01950587, Agency No. 94-1140, 1996 EEOPUB LEXIS 353 (1996). On April 9, 1998, the EEOC denied plaintiff's motion for reconsideration. *See Nghiem*, Appeal No. 01950587, Agency No. 94-1140 Request No. 05970025, 1998 EEOPUB LEXIS 1971 (1998).[3] This action was filed on June 7, 2005, well beyond ninety days after the final agency decision issued in response to plaintiffs EEO complaint.[4]

---

[3] The Court may consider the EEOC decisions at this stage in determining whether plaintiff's claim is timely without converting the pending motion to a motion for summary judgment, because these decisions are a matter of public record. *See Blue Tree Hotels Inv. (Canada) Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 P.3d 212, 217 (2d Cir. 2004) (stating that courts may "look to public records, including complaints filed in state court, in deciding a [Rule I 2(b)(6)] motion to dismiss"); *Ivey v. Kawasaki Rail Car, Inc.*, 05 Civ. 2207 (CPS), 2005 WL 3133765, at *I. n.3 (E.D.N.Y. Nov. 23, 2005) (noting that an EEOC dismissal and notice of rights may be considered at the motion to dismiss stage even though not part of the complaint or relied on by plaintiff because such notices are a matter of public record).

[4] Plaintiff argues that her claim under Title VII falls within an exception to the EEOC timeliness rules—the "continuing violation" doctrine, She argues that "defendants' discriminatory conduct extended until plaintiff's March 2005 last denied repealed request to expunge adverse material from her employment record." (Pl.'s Opp'n Mem 5.) However, plaintiffs argument is misplaced. The continuing violation doctrine, where applicable, allows a plaintiff who makes at least one timely EEO charge as part of an "ongoing policy of discrimination" to bring in claims for *prior* acts of discrimination that would other be time barred under the time limit established for bringing the claim in front of the EEOC in the first instance. .*See Petrosino v. Bell Atlantic*, 385 F.3d 210, 220 (2d Cir. 2004); *Patterson v. Oneida County*, 375 F.3d 206, 220 (2d Cir. 2004). The Court knows of no case, and plaintiff offers none, that applies the continuing violation doctrine to circumstances where a plaintiff filed a timely EEO charge in connection with an alleged discriminatory termination, and then sought to toll the time period provided in the regulations for filing a complaint in federal court by alleging ongoing discrimination that occurred post- termination.

Therefore any action brought by plaintiff under Title VII must be dismissed as untimely.

5. Plaintiff's Remaining State Law Claims

Because plaintiff no longer has any viable federal claim, any remaining viable state law claims belong in state court. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, ... the state claims should be dismissed as well."); *Sadallah v. City of Utica*, 383 F.3d 34, 39-40 (2d Cir. 2004) (citing *Gibbs* in directing district court to enter judgment for defendants on federal law claims and to dismiss any state law claims without prejudice). Accordingly, plaintiff's remaining state law claims, for common law defamation per se, common law self-publication defamation, intentional infliction of emotional distress, tortious interference with employment and prospective business relationships, malicious prosecution, abuse of process, and violation of section 296 of New York State Human Rights Law, N.Y. Exec. Law § 296, are hereby dismissed without prejudice.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss [5] is GRANTED. The Clerk of the Court is respectfully directed to close the case.

SO ORDERED.

Dated: New York, New York
September 5, 2006

Richard J. Holwell
United States District Judge